CORRESPONDENCE.

Directing Verdicts under the Virginia Practice.

Editor "Virginia Law Register:"

In the "Law Register" for February, 1909, in a note by the editors in the case of Taylor *v.* Baltimore & Ohio R. R. Company, recently decided by our Court of Appeals, some remarks are made relative to that case, which seem to me must have been made in haste. The action of the circuit judge in practically directing a verdict, as Judge Whittle parenthetically remarks, in his lucid and concise opinion, is commended by the writer of the note to this case. I for one am very glad that the Court of Appeals does not commend the action of the trial court as does the writer of the note, nor, indeed, do I think the learned Circuit Judge meant to direct a verdict. The Court of Appeals puts it on the better ground and the well-established rule of law, that where it appears the plaintiff is not entitled to recover, in any view of the case, he cannot have been prejudiced by an erroneous instruction, citing Leftwich *v.* City of Richmond, 100 Va. 164, and Moore *v.* B. & O., 103 Va. 189, and other cases.

The note says that the court practically directed a verdict and knew when he was doing it the effect of it, "for the court full well knew the effect the exhibition of an arm, from which the hand had been severed by the alleged negligence of a railroad corporation, would have on the passions of the jury." In a considerable practice before juries in a great many sections of Virginia, I feel prepared to say that a jury is about as free from passion in the determination of questions of fact as the courts, if not more so. The very case mentioned refutes the imputation cast upon juries. The opinion says there was a verdict and judgment for the defendant, which judgment the Court of Appeals was called on to review. This means the jury must have seen the man with his arm cut off, must have had its passion aroused by this "exhibition of an arm, from which the hand had been severed," and yet the jury found for the defendant! The defendant appealed because he thought the jury had been misinstructed, and the Court of Appeals says that it would not reverse the case, even on the ground that the instruction practically directed a verdict, because the conclusion was right.

The rules governing the verdict of juries, finding of facts by a jury, and the weight to be given to the findings of a jury, and demurrers to evidence and kindred subjects are so well settled in Virginia, it seems to me, and so plainly and sanely applied by the present Court of Appeals, that the attempt at times of circuit judges to make rules and deviate from the settled principles laid down by the Supreme Court is to be condemned rather than commended. Directing a verdict by the court and rejecting an instruction, because there is no evidence,

or only a scintilla of evidence, are two widely different propositions and should not be confounded. One is the substitution of the court's finding of fact for that of the jury, and the other is the question of whether there is really any evidence or not. The findings of fact of a jury, and preferably a jury of twelve rather than a smaller number, is to my mind so much more preferable to the finding of fact by a single judge, that I sincerely hope that no reputable law publication will, in Virginia, insist upon anything which tends away from that method. This subject, of course, has been thrashed out pro and con in so many ways and by so many people, that I for one cannot help but regret that the "Law Register" with so distinguished and able a writer as Judge Duke at the head of it, will lend its aid or assistance to the doctrine that our courts should direct a verdict, and as said above, I do not think that that was the intention of the learned judge of the Circuit Court, and it does not seem to me to find any support in the opinion of the Supreme Court in the case of Taylor *v.* B. & O. R. R.

Apropos of this case and the real reason why I am writing this communication, this being a striking example, is to call attention to the fact, as it seems to me, that the law of this case could have been determined by a demurrer and escaped, as the editorial note says, the expense of an appeal or new trial.

The court says: "The trial court instructed the jury that under the allegations of the declaration and proof, the plaintiff was a mere volunteer and that the defendant owed him no other duty than that of not inflicting willful injury upon him." Without animadverting on the part of the instructions that intimate he would owe him a duty, if they had inflicted a **willful** injury upon him, which I do not think is good law, I desire to call attention to the fact that, of course, as the proof must have corresponded with all allegations in the declaration, the declaration itself must have shown such facts as that showed that the plaintiff was a mere volunteer, and a demurrer to the declaration raised every question that could have been raised as to that, by this instruction, and I do not see how there is anything gained by giving an instruction upon a case like that so as to direct a verdict when either a demurrer to the declaration or demurrer to the evidence would have raised the same question and the demurrer to the declaration would have gone to the merits and saved the defendant from the terrible "passion of the jury." This is the course that in my opinion should be pursued and should be encouraged to be pursued. I say this because there is a growing tendency in some of the courts to lightly pass by demurrers and say that they can reach the same results by instructions to the jury. Indeed, it is becoming quite fashionable with the trial courts to permit all sorts of testimony, irrelevant and immaterial, to go to the jury and afterwards seek to reach it and eliminate it by instructions. If a party litigant cannot make out a case on paper he ought not to be permitted to go into

court, take up the time of the court and fish around with the hope of in some how or other, before he gets to the conclusion of the case, making out one. Many of our trial courts, especially the city courts, are congested and yet allow themselves to be imposed upon by taking up days of their time in the trial of a case in which the issues are vague, uncertain and indefinite, by the admission of evidence on these uncertain issues, and then seek to separate the tares from the wheat by an instruction or perhaps by many instructions. The courts thus give themselves unnecessary work, as well as having the jury to perhaps decide the case on some false issue.

The Court of Appeals of Virginia by its stricter ruling as exemplified in what is known as the Hortenstein Case, 102 Va. 914, did the bench and bar of Virginia, as well as litigants, one of the greatest services which has been done by any of its rulings as to pleading, when it announced that the plaintiff must, for instance, allege negligence so as that the facts, if so proven, would make a case instead of alleging it in an indefinite and general way; and yet the court has been liberal and the lower court should be so in allowing any amendments that can be made, so that no litigant can lose his case because of mistake in pleading or technicality. It seems to me, therefore, if the courts would require a case to be made out on paper before they will make up and try an issue and keep out irrelevant matter and not permit all sorts of issues to be tried and all sorts of deviations from the issues and then seek to correct all these troubles by instructions, they would lighten their work, simplify trials of cases and avoid the necessity of directing verdicts after they have perhaps confused the jury by a multiplicity of irrelevant issues.

Judging from my observation, there seems to be two very distinct, and rather opposite tendencies of the nisi prius courts and of the Supreme Court of our State. The former seems to tend toward scattering along the lines above indicated while the Supreme Court in the last ten years has shown a decided tendency the other way, namely, of simplifying and adhering to well established principles which tend to economy and justice. Doubtless the Supreme Court has felt the need of it, because of the tendency shown by the nisi prius courts.

D. C. O'FLAHERTY.

Richmond, Va.

We have read with much interest this learned and earnest defense of the jury system, but the abiding faith of our correspondent in this time-honored institution is not shared by the "Law Register," as he must know from various editorials and notes that have been written since the "Register" passed into the present hands. The decision of the court of appeals in Taylor's case was placed on the ground that an appellate court will not reverse for nonprejudicial error, and the parenthetical remark of Judge Whittle can hardly be regarded as a

rebuke, but more as a sigh of regret that we haven't the excellent practice prevailing in the Federal courts. Isn't it a fact that the exhibition of mangled members in court in accident cases is always fought hard by counsel for the corporations, because of the probable effect it will have on the minds of the jury? See Carrico *v.* W. Va. Cent., etc., R. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50. Something very much like this happened in Roanoke Ry. & Elec. Co. *v.* Sterrett, 14 Va. Law Reg. 690. The plaintiff was a woman! Can our esteemed correspondent maintain that the jury were as qualified as the court, to handle the Taylor case, in which the facts seem to have been undisputed and the rule of the law plain on those facts, whereas the plaintiff was injured while doing the conductor a favor in response to a request from him. Without these binding instructions from the court, it can merely be conjectured what the verdict of the jury would have been. We were under the impression that the recent decision of the court of appeals in Railroad Co. *v.* Stock, 11 Va. Law Reg. 263, was welcomed by the profession, and it seems to indicate some abatement of that former reverence for the jury system. The federal practice is as follows: It is the duty of a court in its relation to the jury to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper in these issues, and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied, and finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law. In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor, that is the business of the jury, but conceding to all the evidence offered the greatest probative force which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court after a verdict to set it aside and grant a new trial. Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly the principle is that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury.